# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~564~~. 110

THE UNITED STATES, APPELLANTS,

vs.

PATRICK J. HICKEY.

APPEAL FROM THE COURT OF CLAIMS.

**FILED SEPTEMBER 23, 1871.**

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vs.

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1 In the Court of Claims.

PATRICK J. HICKEY
*vs.*
THE UNITED STATES. } No. 2208. Filed Feb'y 28, 1866.

To the honorable the Court of Claims of the United States of America:

Your petitioner, Patrick J. Hickey, respectfully shows that he is a citizen of the United States, and a resident of San Francisco, in the State of California; that he has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

Your petitioner further shows that, on the 28th day of July, A. D. 1851, Thomas Corwin, then Secretary of the Treasury, entered into an agreement with James Eldridge, of the State of New York, stipulating for the payment of six thousand dollars per month for the space of two years, for the rent of four warehouses, to be erected by the said Eldridge, in the city of San Francisco, in the State of California, all of which will more fully and at large appear by referring to a copy of said articles of agreement hereto attached (marked "A") and made part of this petition.

By the sixth article of the above agreement, it was provided that the United States should have the privilege, if the Secretary of the Treasury should require it, at the end of two years from the commencement of the term, and so on from two years to two years during the term, to have an assessment of what should be a fair, proper, and reasonable rent for said warehouses for the then next ensuing two years. Such assessment was to have been made by "two disinterested, impartial men of good repute," one to be chosen by the Secretary of the Treasury, and the other by the said Eldridge, and, in case of diaagreement, the said assessors should call to their aid an umpire.

The said warehouses were finished by the first day of May, A. D. 1852, and from that period the said renting, at six thousand dollars per month, began. In 1854 the assessors were first appointed, and the same rent, viz, six thousand dollars per month, was agreed upon for two years next thereafter.

On the 31st of December, A. D. 1855, Milton S. Latham, who was then the collector of the port of San Francisco, and acting under instructions from the Secretary of the Treasury, advertised the
2 said warehouses for rent, (a copy of the said instructions, and also a copy of the said advertisement is hereto attached, and made part of this petition, marked "B" and "C.") The said advertisement invited sealed proposals up to January 15th, 1856.

Your petitioner further shows that he submitted a sealed proposal offering to lease the said warehouses for the unexpired term of the lease from Eldridge, that is to say, until May 1st, 1862, on certain terms, which were accepted by the collector of the port of San Francisco.

In accordance with said proposal, and its acceptance by the Government, through its agent, an agreement was entered into and a lease duly executed between your petitioner and Milton S. Latham, collector aforesaid This lease bears date February first, 1856, and will more fully and at large appear by referring to a copy of said lease hereto attached, (marked "D,") and made part of this petition.

This indenture sub-leased the said warehouses to your petitioner from the 1st day of February, 1856, until the termination of the lease from Eldridge. The rent was to be five hundred dollars per month until the first day of May, 1856, at which time an appraisement was to be made in accordance with the terms of the lease from Eldridge. And your petitioner agreed to pay to the United States such rent as might be assessed by these appraisers for the two years next following the 1st day of May, 1856, and so on, for each and every two years, until the lease from Eldridge was complete and ended.

For and in consideration of the foregoing covenants, on the part of your petitioner, the United States agreed, in said lease, to pay to your petitioner a bonus of two hundred and fifty dollars per month, to be paid at the expiration of each and every month after the execution of the lease, which payment was to continue monthly until the end and completion of the lease.

In the same lease the United States covenanted that your petitioner should enjoy quiet and peaceful possession of the premises, "without any manner of let, suit, trouble, or hindrance, of or from the said party of the first part, or any other person or persons whatsoever."

Your petitioner fulfilled his part of the said agreement, as is evidenced by the three receipts for February, March, and April, 1856, signed by Milton S. Latham, said agent, each calling for the sum of five hundred dollars, with the deduction of the bonus of two hundred and fifty dollars before mentioned. These receipt' are made part of this petition, and marked respectively "E," "F," "G."

3 This monthly bonus for the six years, from May 1st, 1856, to May 1st, 1862, will amount to eighteen thousand dollars, for which sum he asks judgment of this court on this item.

On the 1st of May, 1856, according to the terms of the Eldridge lease, which terms were made part of the sub-lease from the United States to your petitioner, the United States and Eldridge were each to select a person, with power to choose an umpire, to assess the rent for the two years next ensuing. Accordingly, J. Ross Brown was selected by the Secretary of the Treasury on behalf of the United States, and W. W. Stow on behalf of the said Eldridge. In proof of this see Exhibit "H," which is made a part of this petition.

The persons thus selected did not agree upon the rate of rent, nor did they choose an umpire: As the rents were not assessed it was impossible for your petitioner to pay them after May 1st, 1856. The terms of the lease required payment of rent, only upon an assessment. The terms of the lease to your petitioner required him to pay such sum, as should be assessed by the appraisers.

The bonus of two hundred and fifty dollars per month, stipulated to be paid by the United States to your petitioner, depended upon no condition except the taking of the lease. In the language of the lease it was to be paid as a bonus "for leasing said warehouses."

On the 13th day of April, 1857, an agreement was entered into between the United States and said Eldridge, (see Exhibit "I,") which is made a part of this petition.

By this agreement the United States assigned all their right, title, and interest in and to the lease given to your petitioner, to the said Eldridge. It is declared to be the purpose of this agreement to put the said Eldridge in the place and stead of the United States, so far as concerns the rights of the United States under the lease aforesaid to your petitioner, in consideration of said transfer, this assuming the responsibility of the United States, on the part of Eldridge, the United States paid him one

hundred and ten thousand dollars. (See receipt appended to Exhibit "I," made part of this petition.)

Your petitioner avers that this agreement between the United States and Eldridge, by which your petitioner was sold out, was made without his knowledge or consent, and that he was not notified that any such agreement was in contemplation or progress.

Your petitioner believes, and is so advised, that the United States could not legally transfer its obligations or responsibility, to another without his consent. That his consent was never asked for, much less obtained.

4 On the 19th day of August, 1857, Eldridge commenced an action in San Francisco to dispossess your petitioner of the aforenamed premises. (See Exhibit marked "K," which is made part of this petition.)

Your petitioner, relying on the good faith of the United States, and their guarantee expressed in the lease that he should enjoy peaceable possession against all comers, and not having been notified of this transfer of the responsibility on the part of the United States, contented himself with notifying the collector of the port of San Francisco, and G. De La Torre, the United States attorney for that district, that proceedings had been instituted to dispossess him. (See Exhibit "L," which is made part of this petition.)

In accordance with the above notice Mr. De La Torre appeared in the case in his official capacity of United States district attorney, and postponed the trial from time to time till the 5th day of September, 1857, when judgment was rendered for the plaintiff, the defendant not appearing. (See Exhibit "M," which is made a part of this petition.)

Your petitioner further shows that, in consequence of the non-fulfillment of the obligations on the part of the United States, a large and profitable warehousing business, in which he was then engaged, was broken up, and that he sustained damage to at least five hundred dollars per month, which for the time the lease had still to run, will amount to twenty-eight thousand dollars, for which sum he asks judgment of this court on this item.

Your petitioner further represents that while he had possession of these warehouses he stored goods belonging to the United States Light-house Board to the amount of one thousand three hundred and seventy dollars and seventy-five cents, ($1,370 75,) which amount has been demanded of the said Light-house Board, and payment rerefused. (See Exhibit "N."

And your petitioner further shows that he applied to the Secretary of the Treasury at Washington, D. C., for payment for said bonus and damage, and that payment for the same was refused.

Your petitioner therefore prays that you will, after hearing hereof, enter judgment for the sum of forty-seven thousand three hundred and seventy dollars and seventy-five cents (47,370 75) in favor of your petitioner, and grant him such other relief as may be proper. And he will ever pray.

PATRICK J. HICKEY.

W'M LILLEY, *Solicitor for Petitioner.*
FEBRUARY, 1866.

5 CITY AND COUNTY OF WASHINGTON,
*District of Columbia, ss :*

Personally appeared before me, a notary public in and for said county, W'm Lilley, who, being duly sworn, upon his oath states that he is the

attorney for the claimant named in the foregoing petition, and that no assignment or transfer of the claim mentioned in said petition, or any part thereof, or any interest therein, has been made; that the said claimant is justly entitled to the amount therein claimed, after allowing all just credits and offsets, and that he believes the facts stated in said petition are true.

W'M LILLEY,
*Attorney for Claimant.*

Subscribed and sworn to before , at Washington, D. C., this 28th February, 1866.

[SEAL.]

JOHN F. CALLAN,
*Notary Public.*

[Stamp.]

EXHIBIT "A."

Articles of agreement entered into at the city of Washington, in the District of Columbia, on the twenty-eighth day of July, in the year of Christ, one thousand eight hundred and fifty-one, between the United States of America, by the Secretary of the Treasury, Thomas Corwin, contracting on behalf of the Government, and not for himself personally, nor in any manner binding himself personally, of the one part, and James Eldridge, of New York, of the other part, witness:

Article 1st. The said James Eldridge for himself, his heirs, executors, and administrators, covenants with the United States, that he, his heirs, executors, or administrators, will build, or cause to be built for the use of the United States, in the town of San Francisco, in the State of California, four houses, thirty feet by eighty feet each in dimensions, four stories high each, of the usual pitch, the houses to be brick, stone, or iron, and to be fire-proof, at the proper cost and charges of the said James Eldridge, his heirs, executors, or administrators; and on ground to be provided by the said James Eldridge, his heirs, executors, or administrators, at his or their own proper cost and charges, the location of the warehouses to be approved by the collector of the port of San Francisco.

6 Article 2d. The said houses shall be suitable for the uses and purposes of the United States for warehouses, for the storage and safe-keeping of goods, wares, and merchandise, and all the four houses to be completed and ready for use in eighteen calendar months, at farthest, from the date hereof.

Article 3d. The said James Eldridge hereby agrees and covenants to lease, demise, and to farm-let the said four houses, so built and completed, for and during the term of ten years, to commence and be computed from and upon the day on which said houses shall be completed and ready for use, and accepted for use, by the collector of the United States for the port of San Francisco, in the State of California, and thenceforth to be fully completed and ended, which acceptance shall be endorsed on these articles, and signed by the said collector of the port of San Francisco, as the evidence of the commencement of the said term of years.

Article 4th. The United States of America, by the Secretary of the Treasury, Thomas Corwin, contracting for and on behalf of the Government, (and not binding himself, nor to be bound personally, in any event whatever,) covenants and agrees with the said James Eldridge, his heirs, assigns, &c., that the United States of America will and shall

pay, for and during the said term, rent for each of the said houses, the sum of fifteen hundred dollars per calendar month, payable monthly, in the said town of San Francisco, subject, however, to the terms, modifications, and conditions hereinafter expressed.

Article 5th. If the said houses, or either of them, shall be destroyed by a tempest of wind, fire, or the elements, or in any manner other than by the neglect or default of the Government, or its officers, the rent, or a rateable part, according to the house or houses so as aforesaid demolished and rendered unfit for use, shall cease, pro tanto, until the said James Eldridge, or some one for him, shall rebuild or repair, as the case may be, and render such house or houses fit for the use of the United States; it being understood and agreed, that in the case of any such accidental destruction, he, the said James Eldridge, shall and will use all reasonable exertion and diligence to rebuild or repair, as the case may be.

Article 6th. It is understood, covenanted, and agreed that the United States shall have the privilege, if the Secretary of the Treasury shall require it, at the end of two years from the commencement of the term, and so on from two years to two years during the term, to have an assessment of what shall be a fair, proper, and reasonable rent for
7 the said houses for the then next ensuing two years, payable monthly, at the end of each and every calendar month, in San Francisco, such assessment to be made by two disinterested, impartial men, of good repute, one to be chosen by the Secretary of the Treasury of the United States, and the other by James Eldridge, and in case of disagreement, the said assessors so chosen to call to their aid an umpire; and the rents so assessed and fixed by them, shall be the rents demandable and payable for the next then ensuing two years, monthly, and every calendar month, for each and every one of the houses, and so on from two years to two years, during the term.

Article 7th. The said James Eldridge, for hims'lf, his heirs, &c., covenants to and with the United States that he will build the said houses on the land belonging to the United States in the town of San Francisco, called the Government Reserve for revenue purposes—the ground lying between the streets Pacific, Broadway, and Sansome, and extending to Ship Channel, as shown and defined in the plan of the town of San Francisco—in case the collector of the United States for the port of San Francisco shall determine that it is more beneficial to *to* the United States that the houses should be built on that land belonging to the United States than on land to be provided by the said James Eldridge, as aforementioned.

Article 8th. If it shall be determined by the said collector that the said houses shall be built on the said land belonging to the United States, as in the preceding article is provided, then and in that case it is agreed and covenanted, mutually, between the said parties that the rents shall be reduced to the sum of twelve hundred dollars per calendar month for each of the said four houses; and in consideration thereof the United States agree to lease and demise to the said James Eldridge, his heirs, assigns, &c., for and during the aforementioned term of ten years, commencing on the day as specified in the third article, and thenceforth to continue until the full end of said term of ten years be fully ended and completed, all the land described in the seventh article, so far as the United States have right or title, in law or equity, to the same.

Article 9th. If it shall be determined that the said houses shall be

built on the land belonging to the United States, as provided in the preceding articles seventh and eighth, it hereby is declared, agreed, and covenanted that the United States reserves, and shall have the full right and privilege to build a custom-house on said land, and also the right and privilege of building any other house or houses for the
8 use and accommodation of the Government in collecting the revenues of the United States, anything in the lease to the said James Eldridge to the contrary notwithstanding.

Article 10th. It is agreed, understood, and covenanted that, if the said houses be built on the said land belonging to the United States, the first, second, third, fifth, and sixth articles remain in full force, with the exception of that part of the first article which bound the said James Eldridge to provide the ground whereon to build the said houses, and with that exception the residue of the article will remain in full force.

Article 11th. If the houses shall be built on the said land belonging to the United States, according to the terms and conditions of the preceding articles, then and in that case it is mutually agreed between the United States and the said James Eldridge that, at the expiration of said term, the United States shall have the right to take the said houses at the value thereof at the time, to be assessed by two disinterested, impartial, discreet men, one of whom shall be selected by the Secretary of the Treasury and the other by the said James Eldridge; and in case of their disagreement, they shall call to their aid an umpire, or to have the right and privilege of prolonging the lease for ten additional years of said land, the United States paying for the use of said houses such rents monthly for each house as shall be assessed in the manner hereinbefore provided as to the assessment of rents, with all the rights and privileges to the United States mentioned hereinbefore, and subject to all the terms and conditions of said original lease; or the said James Eldridge, his heirs, assigns, &c., will take a lease of the ground aforesaid, at such fair and reasonable rent, to be paid to the United States for the land, as shall be assessed in the manner hereinbefore mentioned for assessing the value of rents. Either of the three alternatives may be taken by the United States.

Article 12th. Before the clause relating to rents shall be binding, the collector, naval officer, and surveyor of San Francisco shall certify that the rent reserved is reasonable; the rent in no event to exceed fifteen hundred dollars per month for each house. And if the collector of the port of San Francisce shall elect to occupy either one of the houses for a custom-house until the Government shall erect a house for the purpose, he shall have the right to do so, the lessor to be at no additional expense on that account.

In testimony whereof the Secretary of the Treasury, Thomas Corwin, for and in behalf of the United States, and James Eldridge, have
9 signed and sealed this instrument, in duplicate, of the day and year first written therein.

THOMAS CORWIN. { SEAL OF THE TREASURY DEP'T. }

JAMES ELDRIDGE. [SEAL.]

Signed, sealed, and acknowledged in the presence of these witnesses—
RICHARD HENRY LEE.
GEO. HARRINGTON.

EXHIBIT "B."

TREASURY DEPARTMENT, *November 17th*, 1855.

M. S. LATHAM, Esq.,
*Collector, &c., San Francisco.*

SIR: Enclosed please find the opinion of Attorney General Cushing, that there is nothing in the law, nor in the lease from Eldridge, that prohibits the underletting the warehouses. You will, therefore, proceed to underlet them according to the instructions to your predecessor; but you may retain one of them for storage, and if you deem it to the interest of the Government, you may allow these stores to become bonded warehouses of class No. 3, if the underlessors desire it, so that they may be used for storage. I think the whole had better be underlet, so that we may see the annual loss the Government sustains on them. The rent, according to the lease, will have to be valued again in May next. You may make it one of the terms of the underletting that the underlessors shall pay to Eldridge all the rent that shall accrue under the lease after the re-valuation in May next, and stipulate the United States shall pay the rent to that time; and if you can make such an underletting, you are authorized to underlet for the balance of the time. Indeed the Department, to get clear of the lease, would agree to pay a bonus of $3,000 per year towards the rent during the remaining six years after May next, besides paying the rent to that time, which you will consider within the discretion confided to you. In disposing of this lease you will use your own discretion whether the lease be disposed of by private contract or at public outcry.

I am, very respectfully,

JAMES GUTHRIE,
*Secretary of the Treasury.*

10 EXHIBIT "C."

COLLECTOR'S OFFICE, SAN FRANCISCO,
*December 31st*, 1855.

Notice is hereby given that three of the four Government warehouses situated at northwest corner of Union and Battery streets, commonly known as the "Eldridge warehouses," will be rented upon reasonable terms. This property is now held by the Government under a lease which will not expire before May 1st, 1862. The buildings may be used by the party letting them as U. S. bonded warehouses of class No. 3, for the storage of merchandise. Sealed proposals will be received up to the 15th of January next. Persons desiring to see the lease or further information are requested to call at this office.

(Signed) MILTON S. LATHAM,
*Collector of Customs.*

I certify the above to be a true and faithful copy of the advertisement inserted in the Alta California newspaper from 1st to 16th January, 1856.

San Francisco, 24 Sept., 1857.

(Signed) JOHN HERON,
*Book-keeper Alta California.*

EXHIBIT "D."

Articles of agreement made and entered into at the city of San Francisco, in the State of California, on the first day of February, in the year of our Lord one thousand eight hundred and fifty-six, between the United States of America, by Milton S. Latham, the collector of the port of San Francisco, contracting on behalf of the Government, and not for himself personally, nor in any manner binding himself personally, of the one part, and P. J. Hickey, of the same place, of the other part, witnesseth:

That whereas by certain articles of agreement made at the city of Washington, in the District of Columbia, on the 28th day of July, in the year of our Lord one thousand eight hundred and fifty-one, the United States of America became the lessees of certain ware-
11 houses, situated in the city of San Francisco, and State of California, which is more fully explained by a copy of said articles of agreement, hereto annexed, and made part of this indenture of lease.

That whereas the said party of the first part, for and in consideration of the rents, covenants, and agreements, hereinafter mentioned, reserved, and contained, on the part and in behalf of the party of the second part, his executors, administrators, and assigns, to be paid, kept, and performed, hath granted, demised, and to farm letted, and by these presents doth grant, demise, and to farm let unto the said party of the second part, his executors, administrators, and assigns, all the three-story brick building, divided into five co'partments, commonly known as the Union-street or Eldridge warehouses, situated on the west side of Battery street, commencing at the corner of Union street, and running northward one hundred and thirty-seven feet and six inches on Battery street.

That whereas the said party of the first part has sub-leased, as lessees aforesaid, said above-described buildings to the said party of the second part, from the date aforesaid to the termination of the lease, hereto annexed, made and entered into between the party of the first part and James Eldridge, for the following consideration: The said party of the second part paying to the party of the first part the sum of five hundred dollars per calendar month until the first day of May, in the year of our Lord one thousand eight hundred and fifty-six, at the expiration of which time an appraisement is to be made as per terms of the annexed lease; when the said party of the second part covenants and agrees to pay to the said party of the first part the sum awarded to be due to James Eldridge by the said arbitrators for the two following years—from the said first day of May, in the year of our Lord, one thousand eight hundred and fifty-six, to the first day of May in the year of our Lord one thousand eight hundred and fifty-eight; and after the first day of May, A. D. 1858, the said party of the second part covenants and agrees to pay the sum that may be awarded for the following years, and so on until the annexed instrument made between the party of the first part and James Eldridge, may be fully complete and ended:

Provided, nevertheless, that the sum of two hundred and fifty dollars per calender month is hereby saved and reserved to the said party of the second part, by the said party of the first part, during the term of the aforesaid lease, as a bonus to the said party of the second part for leasing said warehouses, said amount of two hundred and fifty dollars to be paid at the expiration of each month after the execu-
12 tion of this instrument, and to continue monthly until the completion of the same.

And the said party of the first part covenants and agrees with the

said party of the second part to grant the said party of the second part the privilege of bonding one or more of said warehouses, hereinbefore more particularly described, for the reception of such bonded merchandise as the said party of the first part may deem fit to place in bond.

And the said party of the second part, for himself and his heirs, executors, and administrators, doth covenant and agree, by and with the said party of the first part by these presents, that the said party of the second part, his executors, administrators, or assigns, shall and will monthly, and every month, during the term hereby granted, well and truly pay, or cause to be paid, unto the said party of the first part, the said monthly rents above reserved on the days and in the manner limited and prescribed as aforesaid for the payments thereof, without any deduction, fraud, or delay, according to the true intent and meaning of these presents, and that on the last day of the term of the lease of the estate hereby granted the said party of the second part, his executors, administrators, or assigns, shall and will peaceably and quietly, leave, surrender, and yield up unto the said party of the first part, all and singular, the said demise premises.

And the said party of the first part doth covenant and agree by these presents that the said party of the second part, his executors, administrators, or assigns, shall and may at all times during the said term hereby granted, peacefully and quietly have, hold, and enjoy the said demise premises, without any manner of let, suit, trouble, or hindrance, of or from the said party of the first part or any other person or persons whomsoever.

In testimony whereof the collector of the port of San Francisco, Milton S. Latham, for and in behalf of the United States of America, and P. J. Hickey, have signed and sealed this instrument in duplicate, on the day and year first written therein.

(Signed) MILTON S. LATHAM,
*Collector, acting in behalf of the U. States.*

(Signed) P. J. HICKEY.

Signed, sealed, and acknowledged in the presence of these witnesses—
L. QUINTON WASHINGTON.
J. FRANK MILLER.

13 In addition to the covenants contained in the foregoing lease between Milton S. Latham, collector of the customs for the port of San Francisco, acting in behalf of the Government of the United States, and P. J. Hickey, of the city of San Francisco, dated the first day of February, 1856, it is further covenanted and agreed between the said parties, that if at any time the said Hickey shall fail to pay promptly the rent as stipulated in said lease, the said Milton S. Latham, collector aforesaid, or his successor and successors in office, or any authorized agent of the Government of the United States, shall immediately have the right to enter and take possession of the warehouse mentioned in the preceding lease or covenant for the use and benefit of the United States.

(Signed) MILTON S. LATHAM,
*Collector, acting in behalf of U. States.*

(Signed) P. J. HICKEY.

Signed, sealed, and acknowledged in presence of these witnesses—
L. QUINTON WASHINGTON.
J. FRANK MILLER.

EXHIBIT "E."

*P. J. Hickey, esq., to the United States, Dr.*

| | | | |
|---|---|---|---|
| 1856. | | | |
| February 29. | For rent of Union-street warehouses (Eldridge's) for the month ending 29th of February, 1856.... | $500 | |
| | Deduct bonus paid lessee as per letter of the Secretary of the Treasury, dated November 17th, 1865 | 250 | |
| | | | $250 |

Received, custom-house, district of San Francisco, Cal., March 1, 1856, of P. J. Hickey, esq., two hundred and fifty dollars, in full of above account.

(Signed) MILTON S. LATHAM,
$250.] *Collector.*

14 EXHIBIT "F."

*P. J. Hickey, esq., to the United States, Dr.*

| | | | |
|---|---|---|---|
| 1856. | | | |
| March 31. | For rent of Union-street warehouses (Eldridge's) for the month of March, 1856 ..... | $500 00 | |
| | Deduct bonus paid lessee, per letter of the Secretary of the Treasury, dated Nov. 17th, 1855 .... | 250 50 | |
| | | | $250 00 |

Received, custom-house, district of San Francisco, California, April 1st, 1856, of P. J. Hickey, esq., two hundred and fifty dollars, in full for above account.

(Signed) MILTON S. LATHAM,
$250.] *Collector.*

EXHIBIT "G."

*P. J. Hickey, esq., to the United States, Dr.*

| | | | |
|---|---|---|---|
| 1856. | | | |
| April 30. | For the rent of Union-street warehouses (Eldridge's) for the month ending April 30th, 1856..... | $500 00 | |
| | Deduct bonus paid lessee, as per letter of the Secretary of the Treasury, November 17th, 1855..... | 250 00 | |
| | | | $250 00 |

Received, custom-house, San Francisco, California, May 2d, 1856, of P. J. Hickey, esq., two hundred and fifty dollars, in full of above account.

(Signed) MILTON S. LATHAM,
$250.] *Collector.*

EXHIBIT "H."

In May, 1856, W. W. Stow was chosen by James Eldridge and J. Ross Brown, by the Secretary of the Treasury, to appraise the monthly
15 rents to be paid by the United States for the two years from May 23, 1856, for the warehouses situated at the corner of Union and Battery streets. The appraisers entered upon the discharge of their duties and occupied several days in collecting evidence relative to the value of such rents, and endeavoring to agree upon the amount to be paid by the Government to said Eldridge. The appraisers could not agree, and then attempted to select an umpire to decide between them. In this they failed, owing to the attempt of Brown to dictate his selection. Then Brown declined further to act, and signified his determination to report progress to the Secretary of the Treasury, and await his further directions. Stow notified Brown of his readiness to continue the attempt to agree upon an umpire and fix the rents, and this was declined. Thus matters stood down to the time that Eldridge obtained an assignment of the contract between the Government and Hickey.

(Signed) W. W. STOW.

SEPTEMBER 25, 1857.

EXHIBIT "I."

This indenture, made on the thirteenth day of April, in the year of our Lord eighteen and fifty-seven, between the United States of America by the Secretary of the Treasury, Howell Cobb, (acting in behalf of the United States, and in no way personally binding himself herein,) of the first part, and James Eldridge, of New York, of the second part, witnesseth:

That, whereas, on the twenty-eighth day of July, A. D., 1851, at Washington, the said party of the second part, leased to the United States certain warehouses to be constructed by the said Eldridge in the city of San Francisco, and State of California, at a rent of fifteen hundred dollars per month, as will more fully appear, reference being had to the said agreement between the United States and the said Eldridge, dated July 28th, 1851, a copy of which is hereunto annexed:

And whereas the United States, by Milton S. Latham, collector of the port of San Francisco, sub-leased the aforesaid premises unto P. J. Hickey, by an indenture, dated the first of February, A. D. 1856, and a copy of which is hereunto annexed:

16 And whereas certain difficulties and disputes have arisen between the Government of the United States, and the said Eldridge, concerning the amount of rents lawfully demandable by the said Eldridge from the United States, which disputes it is thought necessary for the interest of both parties to settle and adjust:

Now, therefore, it is hereby agreed and convenanted that the United States shall, and do hereby assign, transfer, and set over unto the said Eldridge all their right, title, and interest in and to the lease, which they, the United States, have given of the said warehouses to the said Hickey, and authorize and empower the said Eldridge to sue for, collect, and recover the rents reserved to the United States by the said lease, as fully as the United States might or could do; it being distinctly understood that it is the object and purpose of this agreement to put the said Eldridge in the place and stead of the United States,

so far as concerns the rights of the United States under the lease aforesaid.

And it is further agreed by and between the parties hereto, that the United States shall pay unto the said Eldridge, in full and entire satisfaction of all rents due and to become due to the said Eldridge from the United States under the indenture of lease first hereinbefore recited, the just and full sum of one hundred and ten thousand dollars.

In consideration of the transfer above provided for, and of the payment of the one hundred and ten thousand dollars hereinbefore agreed to be made to the said Eldridge by the United States, the said Eldridge agrees, covenants, and promises that he will, and accordingly he does, by these presents, release, discharge, and acquit the United States from all claim and demand for any further rent now due, or hereafter to accrue under the lease from Eldridge to the United States, as fully and entirely as if the said lease had never been made. And it is further agreed and covenanted that the United States are not liable for any act or thing done, or omitted to be done by them, their officers, or agents, in, about, or concerning either of the leases herein recited, or about the property leased, or any transaction with any tenant thereof, but the said Eldridge shall indemnify and save the United States from all claims or demands which may be made against them for, or on account of any promises or covenants made by the United States, or either of said leases, or on account of any acts or omissions of officers, or agents of the United States concerning said property, leaving the United States entirely free from all obligations arising out of said leases in any way whatever. But the said Eldridge covenants that he will faithfully fulfill all the obligations of the United States to said
17 Hickey, and will not himself demand, nor suffer any other person to demand from the United States any compensation for non-fulfillment of those obligations, whether it be that the said Eldridge cannot or will not fulfill them.

And the said James Eldridge shall have the right to use the name of the United States, if it be necessary and proper to do so, in any suit which he may have occasion to bring, to enforce his rights under the said sub-lease hereby assigned, the United States incurring no responbility for costs or otherwise.

In testimony whereof the parties aforesaid have hereunto set their hands and seals in duplicate, on the day above written.

(Signed) HOWELL COBB. [L. S.]
*Secretary of the Treasury.*

(Signed) JAMES ELDRIDGE. [L. S.]

In presence of—
P. CLAYTON.
GILBERT RODMAN.

I hereby acknowledge the receipt of one hundred and ten thousand dollars, the consideration money specified in the foregoing agreement.

(Signed) JAMES ELDRIDGE.

In presence of—
P. CLAYTON.
GILBERT RODMAN.

EXHIBIT "K."

STATE OF CALIFORNIA,
*City and County of San Francisco:*

Justice court, 1st district, before D. H. Hanrahan, J. P. Stow & Brown, attorneys for plaintiff.

JAMES ELDRIDGE
*vs.*
P. J. HICKEY.

The people of the State of California to the sheriff or any constable of said city and county, greeting:

Whereas James Eldridge, of the city and county of San Francisco, hath exhibited unto me, a justice of the peace for said city and county, a complaint against P. J. Hickey, of the city and county of San Francisco—

For that, on or about the first day of February, 1856, the United States Government and said P. J. Hickey entered into a written lease, dated on that day, in and by which the said U. S. Government demised and leased unto said P. J. Hickey, for a term commencing on 18 . said day, and ending on the 23d day of May, 1862, at a monthly rent specified in said lease, the following premises: Certain warehouses situate in the city of San Francisco, and being the warehouses heretofore erected by said James Eldridge under a contract with the United States Government.

That, in pursuance of said lease, said Hickey entered into possession of said warehouses, and still remains in possession thereof.

That, by the terms of said lease, said Hickey bound himself to pay the rent therein specified on the last day of each and every month, monthly.

That said Hickey has not paid any rent since the last day of April, 1856, as he had contracted and agreed to do, in and by said lease.

That, on or about the 13th day of April, 1857, the said U. S. Government assigned and transferred to plaintiff in this action the said lease and all rights, claims, and demands of the U. S. Government under the same, and authorized and empowered the said plaintiff to demand, receive, and collect the rents due and to grow due from said Hickey, by the terms of said lease.

That, on the 31st day of July, 1857, plaintiff caused to be demanded of said Hickey, between the hours of five and six o'clock p. m., upon the premises so leased to said Hickey, and occupied by him, the full, true, and exact amount of rent then due, in arrear, and owing by said Hickey, by the terms of said lease.

That such rent, or any part thereof, has not been paid by said Hickey, but the same is still due and unpaid, and has so remained unpaired for the space of three full days.

That, on the 4th day of August, 1857, plaintiff caused to be personally served on said P. J. Hickey a demand and notice, in writing, to deliver up possession of said premises, which said defendant has hitherto wholly failed and refused to do.

Wherefore plaintiff prays judgment for the restoration of said premises to him for the balance of said term, and that said lease be declared forfeited.

You are therefore commanded to summon the said P. J. Hickey, if he

be found in your county, to be and appear before me at my office, in the 1st district, city and county aforesaid, on the 29th day of August, 1857, at 9 o'clock a. m., then and there to make answer unto the complaint aforesaid.

Given under my hand this 19th day of August, 1857.

(Signed) D. H. HANRAHAN,
*Justice of the Peace, 1st District.*

19 I certify the above to be a true copy of the original summons now on file in my office.

(Signed) D. H. HANRAHAN,
*Justice of the Peace.*

EXHIBIT "L."

B. F. WASHINGTON, Esq.,
*United States Collector, San Francisco.*

DEAR SIR: I desire to notify you, in your official capacity, that James Eldridge, esq., has instituted proceedings against me, in the first district justice's court of this city, before D. H. Hanrahan, esq., to obtain possession of the warehouses leased to me by the United States, (by M. S. Latham, esq., your predecessor, as agent, &c.) Summons returnable 29th inst., at 9 o'clock, a. m.

Your ob't serv't,
(Signed) P. J. HICKEY.

SAN FRANCISCO, *August 28th*, 1857.

P. DE LA TORRE, Esq.

DEAR SIR: I desire to notify you in your official capacity, that James Eldridge, esq., has instituted proceedings against me in the first district justice's court of this city, before D. H. Hanrahan, esq., to obtain possession of the warehouses leased to me by the United States. Summons returnable 29th inst, at 9 o'clock, a. m.

Your obedient servant,
(Signed) P. J. HICKEY.

SAN FRANCISCO, *August 28th*, 1857.

STATE OF CALIFORNIA,
*City and County of San Francisco, ss:*

M. C. Conroy, of said city and county, being by me duly sworn, deposed and said that, on the twenty-eighth day of August, in the year one thousand eight hundred and fifty-seven, that he personally delivered to B. F. Washington, collector of the port of San Francisco,
20 and P. De La Torre, United States district attorney, the original letters, of which the annexed are true copies, respectively as the same are addressed.

(Signed) M. C. CONROY.

Subscribed and sworn to before me this 25th day of September, A. D. 1857.

[L. S.] (Signed) F. J. SHIBAULT,
*Notary Public.*

EXHIBIT "M."

STATE OF CALIFORNIA,
*City and County of San Francisco :*

Justice court, 1st district, before D. H. Hanrahan, esq., J. P. Stow & Brown, att'ys for plaintiff. Della Torre, att'y for defendant.

JAMES ELDRIDGE
*vs.*
P. J. HICKEY.

AUGUST 19TH, 1857.—Complaint filed for the restitution of premises unlawfully detained from plaintiff, by defendant, and for rent accrued during said retainer. Summons issued, returnable August 29th, 1857, at 9 o'clock, a. m. P. Crowley, officer. Process returned, served personally on defendant by a duly-certified copy.

AUGUST 29TH, 1857.—Parties in court, by their attorneys, and cause continued, by consent, until September 3, 1857, at 9 o'clock, a. m.

SEPTEMBER 3D, 1857.—Cause continued, by request of defendant's attorney, to September 5th, 1857, at 9 o'clock a. m.

SEPTEMBER 5TH, 1857.—Plaintiff in court; defendant comes not. The proof and testimony of W'm Stow heard for plaintiff; no evidenc' introduced on part of defendant; and judgment rendered in favor of plaintiff and against defendant, to have restitution of the premises described in his complaint with costs of court.

OCTOBER 31ST, 1857.—Writ of restitution issued. P. Crowley, officer. And returned November 2, 1857, duly executed by dispossessing the above-named defendant, P. J. Hickey, from the premises described in the complaint of plaintiff, and placing W'm Stow, attorney for the plaintiff, in possession of said premises.

21 I certify the foregoing to be a true and correct transcript of the proceedings in the above case as entered in my docket.

(Signed) DAN'L H. HANRAHAN,
*Justice of the Peace, 1st District.*

Costs $17 25.

STATE OF CALIFORNIA,
*City and County of San Francisco :*

I, William Duer, county clerk of the city and county of San Francisco, do hereby certify that Daniel H. Hanrahan, whose genuine signature is affixed to the annexed exemplification, was at the time of signing the same, a justice of the peace, duly authorized by law to attest such exemplification, and that full faith and credit are due to all his official acts as such.

Given under my hand and seal of said county court this 7th day of November, A. D. 1857.

[L. S.] (Signed) W'M DUER, *County Clerk.*
(Signed) W. R. SATTERLEE,
*Deputy County Clerk.*

EXHIBIT "N."

COLLECTOR'S OFFICE,
*San Francisco, Sept. 4th*, 1858.

SIR: Enclosed I send an account of P. J. Hickey for storage on light-house goods as set forth therein. Mr. Hickey was the lessee under the United States of the Union-street warehouses, and this account was not paid at the time because it was claimed that he owed the Government back rents on account of said building. Since, however, no steps have been taken to collect them, and he having surrendered the buildings, I think the account ought to be paid. The items are correct.

Very respectfully, your obedient servant,
(Signed) BENJ. Y. WASHINGTON,
*Collector.*

Hon. HOWELL COBB,
*Secretary of the Treasury.*

22 *Major Hartman Bache, superintendent U. S. light-house dep't, 12th L. H. dis't, in account with P. J. Hickey, Dr.*

| | | |
|---|---|---|
| 1856. | To storage from May 1st to June 1st, 1 month, 193½ tons sundries at 50 cents per ton | $96 75 |
| | June 1st to July 1st, 1 month, 157½ tons sundries | 78 75 |
| | July 1st to August 1st, 1 month, 152½ tons sundries | 76 25 |
| | August 1st to Sept. 1st, 1 month, 154 tons sundries | 77 00 |
| | Sept. 1st to Oct. 1st, 1 month, 206 tons sundries | 103 00 |
| | October 1st to Nov. 1st, 1 month, 219 tons sundries | 109 50 |
| | Nov. 1st to Dec. 1st, 1 month, 215½ tons sundries | 107 75 |
| | Dec. 1st to Jan'y 1st, 1 month, 235½ tons sundries | 117 75 |
| 1857. | Jan'y 1st to Feb'y 1st, 1 month, 230 tons sundries | 115 00 |
| | Feb'y 1st to March 1st, 1 month, 215¾ tons sundries | 107 88 |
| | March 1st to April 1st, 1 month, 193 tons sundries | 96 50 |
| | April 1st to May 1st, 1 month, 163½ tons sundries | 81 75 |
| | May 1st to June 1st, 1 month, 139 tons sundries | 69 50 |
| | June 1st to July 1st, 1 month, 79 tons sundries | 39 50 |
| | July 1st to August 1st, 1 month, 64¼ tons sundries | 32 12 |
| | August 1st to Oct. 1st, 2 months, 61¾ tons sundries | 61 75 |
| | | $1,370 75 |

SAN FRANCISCO, *October 1st*, 1857.

23 In the United States Court of Claims. December term, A. D. 1866.

PATRICK J. HICKEY
*vs.*
THE UNITED STATES. } No. 2208. Filed May 21, 1866.

And the said defendants, by their solicitor, come and make answer to the petition of the claimant herein; and not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of forty-seven thousand three hundred & seventy dollars and seventy-five

cents the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

JOHN J. WEED,
*Ass't Solicitor for the United States.*

24 In the Court of Claims. Dec. term, 1869.

PATRICK J. HICKEY
*vs.*
THE UNITED STATES. } No. 2208. Filed Jan'y 8, 1870.

The defendants answer the claimant's petition, and alleges, by way of set off, the following facts:

That the claimant is indebted to the defendants in the sum of nine thousand dollars ($9,000) for the rent, use, and occupation of the premises commonly known as the Union-street or Eldridge warehouses, situated on the west side of Battery street, commencing at the corner of Union street, in the city of San Francisco, California, which premises the defendants allege the said claimant leased of them, the said defendants, at and for the monthly rent of five hundred dollars, ($500,) payable monthly as per lease referred to in said claimant's petition, as set forth in Exhibit D, and that said claimant took and leased said premises and has not paid said rent for the use and occupation of said premises from the 1st day of May, 1856, up to the first day of November, 1857, and is indebted to said defendants for such rent, to wit, for eighteen months, in the said sum of nine thousand dollars, which defendants claim should be set off against the said demand of the claimant
25 against them, and they demand judgment for such balance as may be found their due.

THOMAS H. TALBOT,
*Ass't Att'y Gen'l.*

26 In the Court of Claims of the United States. Dec. term, 1869.

PATRICK J. HICKEY
*vs.*
THE UNITED STATES. } No. 2208.

*Special plea for defendants.*

And the said defendants, by their Attorney General, now come, and, by leave of court, (as expressed in Rule IX,) say that the said claimant ought not further to maintain said action, because—

1. While the claim presented in this petition is such as is ordinarily settled in an Executive Department, the petition does not set forth the decision thereon of the proper Department of the Government to which application was (as is alleged) made for the payment of the claim. (Rule II.)

2. The petition does not set forth a full statement of the action on the claim therein presented, by a Department of the Government, as required by section 1 of the act of February 4, 1855.

3. The evidence in the case does not show that any application has ever been made to any Deparment of the Government, whether with or

without success, or any action whatever thereon, without which action this court has no lawful jurisdiction in this case.

And the said defendants pray judgment, &c.,

THOMAS H. TALBOT,
*Assistant Attorney General.*

Filed Jan'y 20, 1870.

27 In the Court of Claims.

PATRICK J. HICKEY
*vs.* } 2208. Filed Feb'y 15, 1870.
THE UNITED STATES.

And the said plaintiff, by his attorneys, Moore & Bright, by leave of the court, comes, and, for replication to the defendants' special plea, says "precludi non," because he says—

1. That the plaintiff's petition does set forth the decision of the proper Department of the Government refusing the plaintiff's claim.

2. The petition does set forth a full statement of the action by the Department, as required by section first of the act of Congress of Feb'y 24, 1855.

3. The evidence does show that application was made by the plaintiff to the proper Department of the Government for the payment of his claim, and that the same was refused by the said Department; wherefore he prays judgment, &c.

MOORE & BRIGHT,
*Att'ys for Pl'ff.*

28 And the said plaintiff, by his said attorneys, and by leave of the court, says, as to the defendant's second plea, "precludi non," because he says before the commencement of this suit he had fully paid off and discharged all rents due and payable by him to the defendants, according to the terms of the contract sued on, and that he does not owe any rent whatever to the defendants; and this he prays may be inquired of by the court.

MOORE & BRIGHT,
*Att'ys for Plaintiff.*

W'M LILLEY.

This day personally appeared W'm Lilley before me and made oath that he is the attorney-in-fact of the plaintiff, P. J. Hickey, and that the facts set forth in the foregoing replication to the defendants' plea No. 2, are true to the best of his knowledge & belief. Feb'y 16, 1870.

W'M LILLEY.

Sworn to & subscribed before me this 16th day of February, 1870.

JNO. RANDOLPH,
*Ass't Cl'k C't of C.*

29 In the Court of Claims.

PATRICK J. HICKEY
*vs.* } 2208.
THE UNITED STATES.

And now, to wit, 28th of March, A. D. 1870, the court, upon due con-

sideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Patrick J. Hickey have and recover of and from the United States the sum of one thousand three hundred & seventy dollars seventy-five cents, ($1,370 75.)

By the court.

A true copy of record.

30 In the Court of Claims.

PATRICK J. HICKEY
*vs.*
THE UNITED STATES. } 2208.

From the judgment rendered in the above-entitled cause, on March 28, 1870, in favor of the claimant, the defendants, by their Attorney General, on this 27th day of May, 1870, make application for, and give notice of, an appeal to the Supreme Court of the United States; the amount in controversy therein exceeding three thousand dollars.

THO'S H. TALBOT,
*Ass't Att'y Gen'l.*

Filed in clerk's office May 27, 1870.

PATRICK J. HICKEY
*vs.*
THE UNITED STATES. } 2208.

Ordered, That the appeal be allowed as prayed for.

By the court.

DEC. 19, 1870.

31 Court of Claims.

PATRICK J. HICKEY
*vs.*
THE UNITED STATES. } No. 2208.

*Findings of fact and conclusions of law.*

This case having been heard before the chief justice and judges of the Court of Claims, at the city of Washington, on the 28th day of March, 1870, the court, after due deliberation upon the proofs and evidence given at the trial, does hereby, at the time of rendering judgment, find the following facts:

I. On the 28th July, 1851, the Secretary of the Treasury entered into the agreement with James Eldridge, described in and annexed to the petition. The warehouses specified in the agreement were erected and finished by the 1st May, 1852, and the defendants thereupon accepted and occupied the same as tenants of Eldridge at a rental of $6,000 per month.

II. On the 17th November, 1855, the Secretary of the Treasury issued to the collector of the port of San Francisco, the instructions described in and annexed to the petition. On the 31st December, 1855, the collector published the advertisement described in and annexed to the petition. On the 1st February, 1856, the collector, under the Secretary's

instructions, entered into the agreement with the claimant described in and annexed to the petition. The claimant entered into possession of the warehouses thereunder, and paid the rent thereof for February, March, and April, 1856, the defendants allowing and deducting the "bonus" named in the agreement. On the 1st May, 1856, the
32 Secretary of the Treasury, on behalf of the defendants, selected one J. Ross Brown, & Eldridge, on his own behalf selected one W. W. Stow, that the persons so selected might make an assessment of a fair, proper, and reasonable rent of the warehouses for the two years next ensuing under and pursuant to the terms of the original agreement with Eldridge. The persons so selected failed to agree upon an assessment of the rent, and they also failed to agree upon an umpire. The Secretary of the Treasury was notified of their disagreement, but neglected to appoint any other person to make such assessment, or to take measures to secure the same. The claimant refused to pay any rent after the 1st May, 1856, until it should be reassessed pursuant to the terms of his agreement. The defendants refused to pay to him the bonus named in the agreement.

III. On the 13th April, 1857, the Secretary of the Treasury entered into the second agreement with Eldridge, described in and annexed to the petition. The agreement was made without the knowledge or assent of the claimant. On the 19th August, 1857, Eldridge commenced proceedings before a justice of the peace, in San Francisco, to dispossess the claimant, and the summons described in and annexed to the petition was served upon the claimant, who thereupon notified the col-
33 lector of the port and the United States district attorney, at San Francisco, of such proceedings. The district attorney appeared on the return day of the summons in his official capacity, and procured an adjournment of the proceedings, from time to time, until the 5th September, 1857, when he failed to appear. Judgment was thereupon entered in favor of Eldridge, and the claimant was dispossessed and evicted from the premises.

IV. The claimant, while in the occupation of the warehouses before described, stored the defendant's goods at the request of their Light-house Board, the fair and reasonable value of which was $1,370 75. The defendants have failed and neglected to pay the claimant for such storage.

V. The claimant has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to the rebellion.

And the Court of Claims, as a conclusion of law upon the foregoing facts, decides—

1. That the "bonus" mentioned in the claimant's agreement with the defendants was in effect a mere reduction from the rent which
34 he might be liable to pay, and for it he should not recover.

2. That the claimant was not required to pay rent under his agreement with the defendants subsequent to the 1st May, 1856, until they should procure a re-assessment of the same in the manner provided by the original agreement with Eldridge, and that for any rent accruing after the 1st May, 1856, the defendants, in their counter-claim should not recover.

3. That the claimant should recover judgment for $1,370 75.

By the court.

(Indorsed:) 2208. Hickey vs. The United States. Findings of the court.

35 In the Court of Claims.

PATRICK J. HICKEY
*vs.*
THE UNITED STATES. } No. 2208.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the Attorney General for the allowance of an appeal, as filed in the clerk's office May 27, 1870, and of the order of the court allowing the same; of the finding of facts and conclusions of law thereon, on which the court founded its judgment.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this twenty-third day of September, A. D. 1871.

[SEAL.]

JOHN RANDOLPH,
*Asst. Clerk Court of Claims.*

(Indorsement on cover:) No. 564. The United States, appellants, vs. Patrick J. Hickey. Court of Claims. Filed 23d September, 1871.

# In the Supreme Court of the United States.

DECEMBER TERM, 1872.

THE UNITED STATES, *Appellants.*
*vs.*
P. J. HICKEY. } No. 110.

*Appeal from the Court of Claims.*

BRIEF FOR THE UNITED STATES.

# In the Supreme Court of the United States.

DECEMBER TERM, 1872.

THE UNITED STATES, *Appellants*,
*vs.*
P. J. HICKEY. } No. 110.

*Appeal from the Court of Claims.*

BRIEF FOR THE UNITED STATES.

STATEMENT.

On the 28th of July, 1851, one Eldridge agreed with Thomas Corwin, then Secretary of the Treasury, to erect in San Francisco, California, four warehouses; for the use of which Corwin agreed to pay rent at the rate of six thousand dollars a month for two years, reserving to the United States the privilege, if the Secretary of the Treasury should require it, at the end of two years from the commencement of the term, and so on, from two years to two years during the term, to have an assessment of what would be a fair rent for the next ensuing two years; such assessment to be made by disinterested men of good repute, one to be chosen by the Secretary of the Treasury, and the other by Eldridge, and in case of disagreement, the assessors to appoint an umpire.

The warehouses were finished by the first of May,

1852, and the term, which was ten years in the whole, commenced from that period; and in 1854 assessors were first appointed, and fixed the rent, for the next two years, at six thousand dollars a month.

On the 31st of December, 1855, Milton Latham, then collector at the port of San Francisco, acting under instructions of the Secretary of the Treasury, advertised said warehouses for rent, and upon the 1st of February, 1856, assigned the said lease to the petitioner, Hickey, at a rent of five hundred dollars a month until the 1st of May, 1856, and thereafter at such rent as might be assessed by the appraisers, until the lease from Eldridge was complete, and according to the terms of the lease from this person to the United States.

The United States agreed, in its assignment to Hickey, to pay him a *bonus* of $250 a month at the expiration of each month after the execution of the lease, to continue monthly until the end of the lease, and they also covenanted that he should enjoy quiet possession of the premises without any manner of let from the said party of the first part, or from any other person whomsoever.

According to the instructions of Mr. Guthrie, Secretary of the Treasury, dated November 17, 1855, Mr. Latham was informed: "You may make it one of the terms of the underletting that the underlessors shall pay to Eldridge all the rent that shall accrue under the lease after the revaluation in May next, and stipulate the United States shall pay the rent to that time; and, if you can make such an underletting, you are authorized to underlet for the balance of the time. Indeed, the

department, to get clear of the lease, would agree to pay a *bonus* of $3,000 per year towards the rent during the remaining six years after May next, besides paying the rent to that time, which you will consider within the discretion confided to you."

Hickey paid the rent and received the *bonus*, as stipulated, to the 1st of May, 1856. On this day an attempt was made to have the rent assessed for the two years next ensuing, but there was a miscarriage, and no assessment was ever made.

On the 13th day of April, 1857, the United States assigned to Eldridge their interest in the lease to Hickey, declaring that their purpose thereby was to put Eldridge in their place and stead so far as concerned the rights and duties of the United States under the lease to Hickey, and as a consideration therefor the United States paid one hundred and ten thousand dollars, ($110,000.) Hickey was not party to, or notified of, this agreement.

On the 19th of August, 1857, Eldridge commenced an action to dispossess Hickey of the warehouses; and the latter, relying on the covenants of the United States for quiet possession, notified the collector of the port of San Francisco, and also the United States district attorney for that district, of the proceedings to dispossess him. The United States attorney at first appeared in the case, but afterwards judgment was rendered for the plaintiff, for want of appearance of the defendant, on the 5th of September, 1857.

Hickey claimed, by his petition, that he was entitled to eighteen thousand dollars, the amount of *bonus* for six years, from 1856 to 1862; also, for damages in the breaking up of his warehousing business, twenty-eight thousand dollars; and for storage of goods belonging to the United States, one thousand three hundred and seventy dollars and seventy-five cents, ($1,370 75.)

By its answer, filed in the Court of Claims sometime in 1869, the United States alleged, by way of set-off, that Hickey was indebted to it in the sum of $9,000, for rent of the warehouses, between the 1st day of May, 1856, and the 1st day of November, 1857, and thereupon they demanded judgment for such balance as might be found due on account.

The Court of Claims rejected the first two items of the petitioner's account, but gave him judgment for the latter, and the United States appealed.

The account for storage allowed to the claimant runs through seventeen months, from the 1st of May, 1856, to the 1st of October, 1857; the greatest amount of any one month being $117 75.

ARGUMENT.

The question involved in this appeal is, whether the United States has any "set-offs, or counter-claim for damages, liquidated or unliquidated, or other demand whatever," (act March 3, 1863, § 3,) against the petitioner, Hickey.

The counter-claim is not required to be liquidated. It may unliquidated, or, other demand whatsoever. In other words, the question is, whether it was under-

stood between the parties, that after the 1st of May, 1856, rent was to be paid, although the amount was left uncertain.

I.

There seems to be no ground for saying that he is not now responsible, on his own theory, for such an amount as a tribunal, to be created in a certain way, shall say. *Id certum est quod certum potest reddi.* It is not liquidated, but it is existing.

II.

It is important to observe that the transaction between the United States and Hickey is an *assignment*, and not, as called in the papers, a *sub-lease*.

The duration of the estate given by the United States to Hickey, is thus described, (Record, page 8:)

"That whereas the said party of the first part (the United States) has sub-leased, as lessees aforesaid, said above-described buildings to the said party of the second part, (P. J. Hickey,) from the date aforesaid, (February 1, 1856,) to the termination of the lease, hereto annexed, made and entered into between the party of the first part and James Eldridge."

The question is, what is the *nature* of the conveyance, not, what has it been called by the parties. It is a transfer of the whole interest of the United States in the warehouses, and is therefore, necessarily, an assignment.

Stephens's Comms., 1, 542.

Thorn *vs.* Woollcombe, 3 B. & Adol., 586; E. C. L. R., vol. 23.

As a consequence of this, Hickey became bound to Eldridge for all rent that the United States, the lessee and assignor, had agreed to pay, that is, for $6,000 a month, unless arbitrators appointed from time to time should say otherwise. This was the situation even anterior to the second transaction between the United States and Eldridge.

This throws light upon the meaning of the contract between the United States and Hickey. Mr. Latham, under the instructions of Mr. Guthrie, was authorized to pay the *bonus* (which he did pay) only in case the lease was taken off the hands of the United States. That was the limit of his authority. Mr. Guthrie's instructions to that effect are produced by the petitioner, and were doubtless known to him at the time of the transaction. They are part of the *res gestæ*—a substantial link in Hickey's title—and show that the meaning of the lease to Hickey was not that there should be no payment of rent after May, 1856, unless assessed, &c., but only that after that time the amount to be paid should be what the United States was bound to pay. The United States were bound to pay Eldridge $6,000 per month, unless they exercised their privilege of having an assessment, and, by the assignment, Hickey took upon himself this burden.

It is true that the words of the express contract between Hickey and the United States bind the former, after the 1st of May, 1856, only to pay such an amount as might be assessed. But upon a consideration of the whole transaction, including the relations of Hickey, as assignee, to Eldridge, and thereupon indirectly, to

the United States, it seems clear that Hickey's obligation by his contract with the United States was, that if there was no assessment upon the 1st of May, 1856, he would, in effect, take the place of the United States in their contract with Eldridge, as regards the payment of the rent, receiving the *bonus* of $250 a month by way of insurance.

Hickey seems to have misunderstood the effect of the covenant by the United States, that during the said term he should peaceably and quietly have, hold, and enjoy the said demised premises, without any manner of let, suit, trouble, or hindrance from the said party of the first part or any other person whomsoever. Plainly, that covenant has no operation in the action brought by Eldridge for the restoration of the premises; for this action proceeded upon the ground that the term had expired, under the California statute, by his failure to pay rent; and the judgment recovered was in accordance with this allegation.

It is admitted that Hickey paid the rent to no one after the 1st of May, 1856; but, by the law of the assignment, it appears that at the time of the suit brought by Eldridge for possession, he was indebted to him for rent to the amount of $20,000, subject to whatever effect the second transaction between the United States and Eldridge might have; and it appears that Hickey disclaims whatever effect that transaction might have had.

Upon the whole, the case is one in which the assignee of a lessee, who is indebted to the original lessor for a large amount, which the lessee has been compelled

to pay, demands that the lessee shall pay him a debt much less than that already paid for him to the original lessor, and one, at that, growing out of the same transaction.

The assignee of a lease in possession, is to be regarded as the principal debtor for rent to the lessor, and the lessee as only secondary.

Hickey's claim is entirely wanting in merit, and the technicalities by which he seeks to maintain it will scarcely avail him.

S. F. PHILLIPS,
*Solicitor General.*

IN THE

# Supreme Court of the United States.

THE UNITED STATES, APPELLANT,
*vs.*
PATRICK I. HICKEY, APPELLEE

*On appeal from the Court of Claims.*

BRIEF FOR APPELLEE.

This appeal comes to this court from a judgment of the Court of Claims against the appellant and in favor of the appellee.

The facts in the record are few and simple, and the case must be determined mainly on the proper construction of the covenants between the parties. Said covenants are set out fully and at large in the appellee's petition.

It will be seen by the court that on the 28th day of July, 1851, Thomas Corwin, then Secretary of the Treasury, entered into an agreement with James Eldridge, of the State of New York, stipulating for the payment of six thousand dollars per month for the rent of a block of buildings to be erected by the said Eldridge in the city of San Francisco, in the State of California. This agreement was to remain in full force for fourteen years.

The sixth article is as follows, (see pp. 6 and 7 :)

" Article 6. It is understood, covenanted, and agreed, that the United States shall have the privilege, if the Secretary of the Treasury shall require it, at the end of two years from the commencement of the term, and so on from two years to two years during the term, to have an assessment of what shall be fair, proper, and reasonable

rent for the said houses for the then next ensuing two years, payable monthly, at the end of each and every calendar month, in San Francisco. Such assessment to be made by two disinterested, impartial men of good repute, one to be chosen by the Secretary of the Treasury of the United States, and the other by James Eldridge, and in case of disagreement the said assessors so chosen to call to their aid an umpire; and the rents so assessed and fixed by them shall be the rents demandable and payable for the next then ensuing two years, monthly, and every calendar month, for each and every one of the houses, and so on from two years to two years during the term." (See Petition, page 9.)

On the 17th day of November, 1855, James Guthrie, then Secretary of the Treasury, addressed a communication to M. S. Latham, collector of the port of San Francisco, enclosing him the opinion of Attorney General Cushing, and authorizing him to underlet the houses. (See page 9th of the record.) On receipt of the above directions, to wit, December 31, 1855, the said collector caused to be inserted in the *Alta Californian* newspaper his advertisement of the renting of the warehouses. (See page 10 of the Petition.) On the first day of February, 1856, the United States sub-let the above-named property to the appellee, Hickey. (See pages 10, 11, and 12 of the Petition.) The lease from Eldridge was part of the agreement thus entered into with Hickey, as will be seen by the express words contained in said agreement, and which reads as follows: "*and made part of this indenture of lease.*"

The claimant, Hickey, brought his suit in the United States Court of Claims to recover the bonus of $250 stipulated for in his said agreement with the United States, and also for his account, near $1,400, for storage. The court below gave him his storage, but refused the bonus. In refusing the bonus we think the court erred, and shall proceed to offer our reasons for this conviction. Therefore we must beg to invite the attention of the court most

particularly to the covenant stipulating for the payment of the bonus of $250 per month to Hickey. The question which presents itself at the very threshold of this important inquiry is, "What was the consideration for the bonus, and why was it agreed to be paid to Hickey?" Let the express words of the covenant itself answer the inquiry, and the question is settled. Here are the words: "*Provided, nevertheless,* That the sum of two hundred and fifty dollars per calendar month is hereby saved and reserved to the said party of the second part by the said party of the first part during the term of the said lease as a bonus to the said party of the second part *for leasing said warehouses, said amount of* $250 *to be paid* at the expiration of each month after the execution of this instrument, and to continue monthly until the completion of the same."

Then it is clear that the "consideration for the bonus was *the leasing of the warehouses.*" This view is greatly fortified and strengthened by the letter of Mr. Guthrie to Mr. Latham in relation to sub-letting the houses. Mr. Guthrie manifested great solicitude to make some disposition of the houses in order to extricate the appellant from the consequences of a hard bargain which had been made with Eldridge. (See said letter on page 9 of the Petition.)

It surely could not have been intended as a mere payment of so much upon Hickey's monthly instalments for rent. If it had been, the contract would have made the rent $250 instead of $500. The consideration was paid by Hickey for the bonus the moment he leased the houses, and his right to it was full and complete on that day. The bonus was subject to no contingencies in the future. The sum was fixed, and could neither be increased nor diminished by any increase or diminution of the rent. Suppose that after the 1st of May, 1856, the assessors had fixed the rental value at $50, could it be contended for a moment that Hickey should lose his bonus because the rent would not consume it? Surely not. Moreover, there was no sum stipulated for rent after the 1st of May, 1856,

except such sum as the assessors should fix. It was not stipulated that after that period, if the assessors failed to assess the rent, that the $500, or any other sum, should be continued as the rent to be paid by Hickey after the 1st of May, 1856. Now, at this very point we would most earnestly ask this court to require the appellant to inform your honors *what amount of rent Hickey* was bound to pay after the month of May, 1856. If the appellant had gone to Hickey after the said 1st of May, 1856, to demand rent, what amount would they have demanded? The appellant could not have demanded $500 per month, for that was only stipulated to be paid up to the 1st of May, 1856. After that period that sum ceased to be the criterion of rent. After that period the amount of rent was to depend alone on the assessment, and that assessment was to depend alone on the will of the Secretary of the Treasury, for with him rested the authority to have it done. Hickey could not; his hands were tied.

We insist that Hickey was not bound to pay one cent of rent after the 1st of May, 1856, until the assessment provided for should be made. He, according to the terms of the covenant, was as much entitled to any advantage that might result to him from the assessment as the appellant would have been to any that might have accrued to the United States. On the one hand, if the rent had by the assessment been increased to $1,000, it would have been the appellant's gain. On the other, if the rent by the assessment had been reduced to $100, or any less sum than $500, it would have been Hickey's gain and the appellant's loss. This chance Hickey was clearly entitled to. This establishes beyond controversy, as we think, the proposition that Hickey was in no default for the non-payment of any rent. Then, we ask, what excuse is there for not paying him his bonus of $18,000? Not only did the Secretary of the Treasury not cause any assessment to be made, but he did not even give Hickey any notice that he had abandoned his purpose to do so, nor did he de-

mand the payment of rent; for this he could not do as none was assessed. But this is not all: for without making any effort to adjust the matter with Hickey, the United Utates, through the said Secretary, sold Hickey out to said Eldridge, and gave him one hundred and ten thousand dollars to step into their shoes and become landlord over Hickey. And this too without the knowledge or consent of Hickey. We have always understood it to be a principle of law, almost universal, that a tenant could not attorn to another without the consent of his landlord, but never did understand that the landlord could compel the tenant to attorn to another whether he was willing or not. But if even it were lawful thus to sell Hickey out, surely Eldridge, while he succeeded to all the rights and interests of the appellant, took upon himself also all the liability and obligations of the appellant to Hickey. Why then did not Eldridge proceed to have the rents assessed, seeing that the United States had failed to do so? Why did he not have the assessment made so as to ascertain the amount Hickey was liable for, and then demand it?

It seems to us that this would have been fair and honest. But it seems that this did not suit Mr. Eldridge, for on the 19th of August, 1857, he instituted suit before a justice of the peace in the State of California to turn Hickey out of the possession of the premises. And this is one of the most remarkable features in this record. Here is Eldridge proceeding, by virtue of his lease from the United States, to turn Hickey out, and the United States district attorney trying to prevent it. Twice did the district attorney appear for Hickey, but at last let the judgment go by default. But this is not the most singular aspect of the case, for the court will see by looking on page 12 of the petition that the United States expressly covenanted to protect Hickey in the uninterrupted enjoyment of the possession of the leased premises. The last paragraph but one of said covenant reads as follows:

"And the party of the first part doth covenant and agree by these presents that the said party of the second part, his executors, administrators, or assigns, shall and may at all times during the said term hereby granted peacefully and quietly have, hold, and enjoy said demised premises without any manner of let, suit, trouble, or hindrance of or from the said party of the first part or any other person or persons whomsoever."

It is curious to look into the complaint filed in that suit, particularly in regard to one statement contained in it. On page 18 of the petition will be found exhibit K, which is the complaint referred to, in which Mr. Eldridge makes this statement: "that on the 31st day of July, 1857, the plaintiff caused to be demanded of said Hickey, between the hours of five and six o'clock P. M., upon the premises so leased to said Hickey, and occupied by him, the full, true, and exact amount of rent then due, in arrear, and owing by said Hickey by the terms of said lease."

We think that the Court will look with at least some degree of distrust on a record which contains so gross and palpable a falsehood on its face. How could he demand the full, true, and exact amount of rent due when no mortal could tell what that rent was? Mr. Eldridge must have been wiser than Balaam's ass, who saw the angel before his master. Mr. Hickey did all that he in good faith was required to do. He gave, as it will be seen by looking on page 19 of the petition, due notice to P. De La Torre, Esq., the United States district attorney, that he had been sued by Eldridge for the possession of the leased property, and believing it the duty of the United States to make good their covenant to protect him in the possession thereof, he trusted to their attorney to fulfil that obligation. It will be remembered that this was no suit by a stranger setting up a paramount right to the houses and premises, but it was the United States prosecuting the suit to dispossess Hickey from that

which they have solemnly covenanted that he should enjoy.

Now, we are led to suppose that the appellant took this appeal, not because the Court below gave judgment for the storage, but because it rejected their counter-claim. Now, if the positions we have already assumed be correct, the question made and insisted on in said counter-claim is already disposed of. But this is not the whole defence against the counter-claim. This is a suit against the United States and not against Eldridge, and as Eldridge has stepped into the shoes of the appellant, acquired all their right, title, and interest, he is the only party who could rely on any counter-claim, and it was the duty of the appellant to have made him a party. This they did not choose to do, and Eldridge is no party to this suit.

But we will not repeat what we have already stated in reference to the question of rent, for it is clear the appellant put it out of the power of Hickey to pay any more rent than he did, and also put it out of his power to use and occupy the premises so as to realize any profit therefrom.

We shall now refer the Court to some authorities in support of our position that this bonus was to be paid to Hickey independent of any question as to the rent; that its payment did not depend upon any contingency connected with the rent. We, however, will not pretend to deny that if Hickey had been in default in the non-payment of rent, and the appellant still was the owner of the leased premises, that it might have been an equitable set-off against Hickey. But as no such state of facts exists, we deem it unnecessary to pursue the argument further on this point.

We refer the Court to the following authorities:

Parsons on Contracts, vol. 2, top pages 528–9, and notes.

Per Shaw, C. J., in Milldam Foundry *vs.* Hovey, 21 Pick., 439.

Thomas *vs.* Cadwalender, Willes, 496.
Knight *vs.* New England Worsted Co., 2 Cush., 286.
Coomb *vs.* Green, 11 Meeson & Welsby's Reports, 480.

In 21 Pick. the following principle is laid down: "But when the act of the one is not necessary to the act of the other, though convenient, useful, or beneficial, yet as the want of it does not prevent performance, and the loss and inconvenience can be compensated in damages, the performance of the one is not a condition to the obligation to perform by the other. Or the non-performance by one must go to the entire substance of the contract, and to the whole consideration; so that it may be safely inferred as to the intent and just construction of the contract, that if the act to be performed on the one side is not done, there is no consideration for the stipulations on the other."

In 2 Cush. (above cited) the Court say: "The question whether covenants are dependent or independent depends upon the intention of the parties and the nature of the acts to be performed."

Howland *vs.* Leach, (11 Pick., 151:) "Some of the stipulations in an entire contract may be dependent, and others independent, according to their nature and the order of performance."

Comb *vs.* Ingersol, 2 Pick., 292.
Kane *vs.* Hood, 13 Pick., 281.

"The same rules apply to a simple contract as to one under seal." Kane *vs.* Hood, above cited.

Many other cases are referred to in this opinion, to which the attention of this Court is respectfully invited.

We therefore submit with much confidence that Hickey is entitled to his bonus of $18,000, as well as to his storage of $1,373.

MOORE & BRIGHT,
*Solicitors, and of Counsel for Hickey.*

IN THE

# Supreme Court of the United States.

THE UNITED STATES, APPELLANT,
*vs.*
PATRICK J. HICKEY, APPELLEE. } *No.* 110.

## *Supplemental Brief for Appellee.*

The counsel for appellee insist that the court below erred in refusing to adjudge to the claimant Hickey his stipulated bonus of two hundred and fifty dollars per month, amounting in the aggregate to eighteen thousand dollars. They respectfully ask the Court to review the whole judgment of the court below, and to give to the appellee the benefit of this error which it is apparent has been committed, to his prejudice, by the judgment of the court below.

J. W. MOORE,
W. LILLEY,
*Attorneys for Appellee.*